OCBC Bank (M) Bhd v Astano Electric Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2–24–1083 OF 1998
KAMALANATHAN RATNAM J
28 MAY 1999

Civil Procedure *— Appearance — Defendant out of local jurisdiction of court — Time limit for appearance is 12 days — Certificate of non-appearance filed within 8 days of service — Premature filing of notice of appointment — Non service of fresh notice of appointment — No breach of audi alteram partem rule — Whether amount to cause to the contrary pursuant to s 256(3) of National Land Code — Rules of the High Court 1980 O 12 rr 4, 8, O 28 r 2 & O 83 r 2(4)*

Land Law *— Sale of land — Order for — Irregularity — Defendant out of local jurisdiction of court — Time limit for appearance is 12 days — Certificate of non-appearance filed within 8 days of service — Premature filing of notice of appointment — Non service of fresh notice of appointment — No breach of audi alteram partem rule — Whether amount to cause to the contrary pursuant to s 256(3) of National Land Code — Rules of the High Court 1980 O 12 rr 4, 8, O 28 r 2 & O 83 r 2(4)*

The plaintiff applied for an order for sale of a piece of land ('the land') pursuant to s 256 of the National Land Code 1965 ('the NLC') and O 83 of the Rules of the High Court 1980 ('the RHC') to recover the sum of RM507,850.47 due to the plaintiff. The originating summons ('the OS') seeking this order for sale was served on 12 November 1998 and it provided the defendant with only eight days to enter appearance. The plaintiff filed the certificate of non-appearance and the notice of appointment to hear the OS on 20 November 1998. On 11 January — the date fixed in the notice of appointment to hear the OS — both parties agreed to adjourn the matter to 23 February 1999.

The defendant raised the issue of irregularity. The defendant argued: (i) non compliance of O 12 rr 4 and 8 of the RHC as the OS provided the defendant with only eight days within which to enter appearance instead of the required 12 days since the defendant's address is out of the jurisdiction of the court; (ii) non-compliance of O 28 r 2 of the RHC as the plaintiff filed the notice of appointment even before the time had expired for the defendant to enter appearance; and (iii) the plaintiff had failed to serve a fresh notice indicating the hearing as 23 February 1999 in accordance with O 83 r 2(4).

Held, dismissing the application:

(1) The defendant's address is outside the local jurisdiction of the Kuala Lumpur High Court as envisaged under O 12 r 4(a) of the RHC. Since the OS was only served on the defendant on 12 November 1998, clearly the defendant had up to 25 November 1998 to enter appearance. Therefore, the filing of

A the certificate of non-appearance on 20 November 1998 which was within eight days of service was wrong (see p 622G–I).

(2) Order 28 r 2 of the RHC provided that only where the defendant has entered an appearance or has failed to enter an appearance within the prescribed time can the plaintiff obtain an appointment for the attendance of the defendant for the hearing of the summons. Again, the plaintiff was premature in filing this notice for the plaintiff filed it even before the time had expired for the defendant to enter the appearance. Thus, the defendant has successfully shown cause to the contrary pursuant to s 256(3) of the NLC (see p 623D–F).

(3) The plaintiff had failed to comply with O 83 r 2(4). The requirement is that the said notice must be served at least two clear days before the hearing on 23 February 1999. In this case, the notice was not served at all. However, both parties attended on 11 January 1999 and notwithstanding the non service of the notice of hearing, the defendant also attended court on 23 February 1999. In any case, the case was adjourned and no order was made. There was in effect no breach of the audi alteram partem rule. Therefore, notwithstanding the use of the word 'must' in O 83 r 2(4), the non service of the notice in this case, does not constitute a 'cause to the contrary' (see p 624B–G); *Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor* [1996] 1 MLJ 374 distinguished.

[Bahasa Malaysia summary

Plaintif telah memohon suatu perintah jualan untuk sebidang tanah ('tanah tersebut') bersesuaian dengan s 256 Kanun Tanah Negara 1965 ('KTN') dan A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mendapat balik jumlah RM507,850.47 yang tertunggak kepada plaintif. Saman pemula ('SP tersebut') yang meminta perintah jualan ini telah diserahkan pada 12 November 1998 dan memperuntukkan defendan dalam tempoh lapan hari sahaja untuk memasukkan kehadiran. Plaintif telah memfailkan sijil ketidakhadiran dan notis lantikan untuk mendengar SP tersebut pada 20 November 1998. Pada 11 Januari — tarikh yang ditetapkan di dalam notis lantikan untuk mendengar SP tersebut — kedua-dua pihak telah bersetuju untuk menangguhkan perkara ini kepada 23 Februari 1999.

Defendan membangkitkan isu luar aturan. Defendan menghujahkan bahawa: (i) ketidakpatuhan A 12 kk 4 dan 8 KMT kerana SP tersebut memperuntukkan defendan di dalam tempoh lapan hari sahaja untuk memasukkan kehadiran dan bukan 12 hari seperti mana dikehendaki memandangkan alamat defendan adalah di luar bidang kuasa mahkamah; (ii) ketidakpatuhan A 28 k 2 KMT kerana plaintif telah memfailkan notis lantikan sebelum tempoh luput defendan untuk memasukkan kehadiran; dan (iii) plaintif telah gagal

untuk menyerahkan suatu notis baru menunjukkan perbicaraan tersebut adalah pada 23 Februari 1999 menurut A 83 k 2(4).

Diputuskan, menolak permohonan tersebut:

(1) Alamat defendan adalah di luar bidang kuasa tempatan Mahkamah Tinggi Kuala Lumpur sebagai mana yang terkandung di bawah A 12 k 4(a) KMT. Memandangkan SP tersebut hanya diserahkan ke atas defendan pada 12 November 1998, dengan jelas defendan telah sehingga 25 November 1998 memasukkan kehadiran. Oleh itu, sijil ketidakhadiran yang telah difailkan pada 20 November 1998 di mana serahan adalah di dalam tempoh lapan hari adalah salah (lihat ms 622G–I).

(2) Aturan 28 k 2 KMT memperuntukkan bahawa hanya apabila defendan telah memasukkan kehadiran atau telah gagal untuk memasukkan kehadiran di dalam tempoh masa yang telah ditetapkan, plaintif boleh memperoleh lantikan untuk kehadiran defendan bagi perbicaraan saman tersebut. Sekali lagi, plaintif telah pramasa di dalam memfailkan notis ini kerana plaintif telah memfailkannya sebelum tempoh telah luput untuk defendan memasukkan kehadiran. Oleh itu, defendan telah berjaya menunjukkan sebab yang berlawanan menurut s 256(3) KTN (lihat ms 623D–F).

(3) Plaintif telah gagal untuk memenuhi A 83 k 2(4). Keperluan ini memperuntukkan bahawa notis tersebut perlu diserahkan sekurang-kurangnya dua hari lapang sebelum perbicaraan pada 23 Februari 1999. Di dalam kes ini, notis tersebut tidak diserahkan langsung. Namun begitu, kedua-dua pihak telah menghadirkan diri pada 11 Januari 1999 dan meskipun notis perbicaraan tersebut tidak diserahkan, defendan juga telah menghadirkan diri di mahkamah pada 23 Februari 1999. Dalam apa jua sebab, kes tersebut telah ditangguhkan dan tiada perintah dibuat. Tidak wujud keberkesanan pelanggaran peraturan audi alteram partem. Oleh itu, meskipun perkataan 'perlu' digunakan di dalam A 83 k 2(4), notis yang tidak diserahkan di dalam kes ini, tidak membentuk 'sebab yang bertentangan' (lihat ms 624B–G); *Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor* [1996] 1 MLJ 374 dibeza.]

Notes

For cases on appearance, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 965–989.

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1660–1712 and 3030–3101.

Cases referred to

Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor [1996] 1 MLJ 374 (distd)

Legislation referred to

National Land Code 1965 ss 256, (3), 257(1)
Rules of the High Court 1980 O 12 rr 4 , 8, O 28 r 2, O 83 r 2(4)

KC Su (*Chan & Associates*) for the plaintiff.
SY Ng (*Raja Darryl & Loh*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

FACTS

This is the plaintiff's application for an order for sale of land held under Title No HS (D) 127093 No PTD 37456 Mukim Pulai Daerah Johor Bahru, Negeri Johor ('the said property') pursuant to s 256 of the National Land Code 1965 ('the NLC') and O 83 Rules of the High Court 1980 ('the RHC') to recover the sum of RM507,850.47 due to the plaintiff as at 29 October 1998. The said sum is due to the plaintiff pursuant to credit facilities of RM700,000 granted by the plaintiff to the defendant, which include:

(a)	Overdraft Facility	RM200,000
(b)	Tradelines Facilities including trust receipts	RM270,000
(c)	Term Loan Facility	RM230,000

As security for the repayment of the sums due and payable to the plaintiff and outstanding under the said loans, the defendant had charged, in favour of the plaintiff the said property by way of two charges.

CASE FOR THE PLAINTIFF

It is the plaintiff's case that the defendant had breached the said charges when it failed to settle the outstanding amount demanded by way of letter of demand dated 17 September 1998 and the statutory notice in Form 16D dated 2 October 1998 issued by the plaintiff's solicitors.

CASE FOR THE DEFENCE

The defence raised three issues, namely:

(1) Irregularity going to the root of the proceedings.
(2) The Kuala Lumpur High Court is not the appropriate forum.
(3) There is cause to the contrary prohibiting the plaintiff from exercising the remedies sought for.

FINDINGS OF THE COURT

Issue of irregularity

Appearance

In support of this issue the defendant relied on O 12 rr 4(a) and 8(3) of the RHC. It is necessary to produce the said rules which read as follows:

Order 12 r 4:

4 Time limited for appearing

References in these rules to the time limited for appearing are references –

(a) in the case of a writ served within the local jurisdiction of each High Court in Malaya, to 8 days and served outside such local jurisdiction but within the jurisdiction of Malaya, to 12 days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these rules, to that time as so extended; and

Order 12 r 8:

8 Appearance to originating summons

(1) Subject to para (2), an appearance must be entered to every originating summons (other than an *ex parte* originating summons) by each defendant named in and served with the summons.

(2) No appearance need be entered to an originating summons in any case or class of case in relation to which special provision to that effect is made by these rules or by or under any written law.

(3) Subject to the foregoing provisions of this rule, the foregoing rules of this Order shall apply in relation to an originating summons to which an appearance is required to be entered as they apply in relation to a writ except that for the reference in rule 4(b) to O 11 r 4(3), there shall be substituted a reference to O 11 r 9(6).

The defendant pointed out that the originating summons ('the OS') seeking this order for sale and the affidavit in support were both dated 29 October 1998. The affidavit of service filed indicated that the OS was served on the defendant on 12 November 1998. The defendant's place of residence as stated in the OS is as follows:

Astano Electric Sdn Bhd
707 Block A
97 Jalan SS 7/2
Kelana Business Centre
Kelana Jaya
47301 Petaling Jaya

This clearly means that the defendant's address is outside the local jurisdiction of the Kuala Lumpur High Court as envisaged under O 12 r 4(a). However, the OS has provided the defendant with only eight days within which time to enter appearance instead of the required 12 days since the defendant's address is outside the jurisdiction of this court. The certificate of non-appearance was filed on 20 November 1998. Since the OS was only served on the defendant on 12 November 1998 clearly the defendant had up to 25 November 1998 to enter appearance. Therefore the filing of the certificate of non-appearance on 20 November 1998 which was within eight days of service was wrong.

On this ground the defendant was successful in showing a cause to the contrary pursuant to s 256(3) of the NLC.

A Notice of appointment to hear OS

The defendant has also in my view correctly taken the objection pursuant to O 28 r 2 of the RHC. The said rule reads as follows:

> Fixing time for attendance of parties before court (O 28 r 2)
>
> B (1) Where, in the case of an originating summons to which appearance is required to be entered, any defendant served with the summons has entered, or has within the time limited for appearing failed to enter, an appearance, the plaintiff may obtain an appointment for the attendance of the parties before the court for the hearing of the summons, and a day and time for their attendance shall be fixed by a notice in Form 57 sealed with the seal of the court.
>
> C (2) A day and time for the attendance of the parties before the court for the hearing of an originating summons to which appearance is not required, or for the hearing of an ex parte originating summons, may be fixed on the application of the plaintiff or applicant, as the case may be.
>
> (3) Where a plaintiff fails to apply for an appointment under para (1), any D defendant may, with the leave of the court, obtain an appointment in accordance with that paragraph provided that he has entered an appearance.

It is obvious that the notice of appointment to hear the OS filed pursuant to O 28 r 2 and in the prescribed Form 57 was also filed on 20 November 1998. The said rule provided that only where the defendant has entered an E appearance or has failed to enter an appearance within the prescribed time can the plaintiff obtain an appointment for the attendance of the defendant for the hearing of the summons. Again the plaintiff was premature in filing this notice for the plaintiff filed it even before the time had expired for the defendant to enter the appearance. Rules of Court, particularly in relation F to entering of appearance and matters relating thereto, have to be strictly complied with. On this issue too I find that the defendant has successfully shown cause to the contrary pursuant to s 256(3) of the NLC.

In the meantime, the defendant filed a notice of appearance on 26 November 1998. I agree that this notice of appearance was filed one day out of time.

G On 11 January 1999, that is, the date fixed in the faulty notice of appointment to hear the OS, both parties were represented by counsel. By consent parties agreed to adjourn the matter to 23 February 1999. On this date counsel for the defendant requested for an adjournment to file an affidavit in reply. However, counsel for the defendant again took another H objection.

Failure to serve fresh notice of appearance before the hearing on 23 February 1999

Order 83 r 2(4) states as follows:

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> (4) Where the hearing is adjourned, then, subject to any directions given by the court, the plaintiff must serve notice of the appointment for the adjourned hearing, together with a copy of any further affidavit intended

to be used at that hearing, on the defendant not less than 2 clear days before the day fixed for the hearing. A

A copy of any affidavit served under this paragraph must be indorsed in accordance with para (3).

It is therefore obvious that the plaintiff had failed to comply with O 83 r 2(4). The plaintiff had failed to serve a fresh notice indicating the B hearing as 23 February 1999. The requirement is that the said notice must be served at least 2 clear days before the hearing on 23 February 1999. In this case, the notice was not served at all. Whilst it might seem superfluous to file this notice even though both parties had in fact attended court on 11 January 1999 and had been informed of the next date, that is 23 February 1999, I was asked to be bound by the decision of the Federal C Court in *Muniandy a/l Thamba Kaundan & Anor v D & C Bank & Anor* [1996] 1 MLJ 374 where the Federal Court held that it was a breach of natural justice by reason of failure to serve the chargors with notice of the adjourned hearing. I do not think the decision of the Federal Court must be given a rigid and inflexible interpretation. In that case the appellant D although served with the OS did not enter appearance. However, on the hearing date, the appellant appeared but the case was postponed to 29 January 1992. On that date the appellant didn't appear and thus the case was heard ex parte and an order in terms of the OS which included an order for sale pursuant to ss 256(3) and 257(1) of the NLC, was made by the court. In their application to set aside the ex parte orders, the appellants E claimed that they had not attended court on 29 January 1992 because they had not been served with a notice of the adjourned hearing pursuant to O 83 r 2(4) of the RHC. They further contended that the ex parte orders were null and void as there had been a breach of the rule of natural justice, expressed in the maxim *audi alteram partem* and reinforced in O 83 r 2(4) of the RHC. In that case judgment was taken ex parte. Here both parties F attended on 11 January 1999 and notwithstanding the non service of the notice of hearing, the defendant also attended court on 23 February 1999. In any case, the case was adjourned and no order was made. There was in effect no breach of the audi alteram partem rule. Therefore notwithstanding the use of the word 'must' in O 83 r 2(4), I hold that the non service of the notice in this case, does not constitute a 'cause to the contrary'. G

In the light of my present findings on issues (a) and (b) I do not see the need to consider the other issues raised by the defendant.

The plaintiff's application is dismissed with costs.

Application dismissed. H

Reported by Benjamin Yong

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